

Bulletin

140 East Front Street, P.O. Box 087, Trenton, New Jersey 08625-0087

BULLETIN 2475

OCTOBER 31, 1997

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New Jersey Department of Law & Public Safety

Bulletin

140 East Front Street, P.O. Box 087, Trenton, New Jersey 08625-0087

BULLETIN 2475

OCTOBER 31, 1997

1. R.J.P.L., INC. V. DIVISION OF ALCOHOLIC BEVERAGE CONTROL -
FINAL CONCLUSION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
AND ADOPTING INITIAL DECISION.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
Division of Alcoholic Beverage Control

R.J.P.L., Inc.	)	FINAL CONCLUSION AND ORDER
	)	GRANTING MOTION FOR SUMMARY
	)	JUDGMENT AND ADOPTING
APPELLANT,	)	INITIAL DECISION
)	
VS.)	
	)	OAL DKT. NO. ABC 0064-95
DIVISION OF ALCOHOLIC	)	AGENCY DKT. NOS 09-95-357
BEVERAGE CONTROL	)	AND 10-94-371
)	
RESPONDENT.	)	OAL DKT. NO. ABC 11401-95
	)	AGENCY DKT. NOS. 10-94-371
	)	(CONSOLIDATED WITH 09-95-368
	)	AND 09-95-368

Anthony J. Guerino, Esq., Attorney for Respondent

Michele Hollar-Gregory, Corporation Counsel, for Respondent, City
of Newark, Alcoholic Beverage Control Board

Analisa Sama Holmes, Deputy Attorney General, for Respondent,
Division of Alcoholic Beverage Control (Peter Verniero, Attorney
General of New Jersey)

INITIAL DECISION

HONORABLE LINDA BAER, ADMINISTRATIVE LAW JUDGE

Decided: October 29, 1996

Received: November 13, 1996



New Jersey Department of Law & Public Safety

BY THE DIRECTOR:

In January 1988, the former license holder, Churrasqueira, Inc. sold license number 0714-33-489-003 to R.J.P.L., Inc. the principals of R.J.P.L., Inc., were Riccardo DiSilva, Paulo Alameida and Jack Alameida. The last renewal application for the license was filed for the 1991-92 license term.

In his affidavit, Mr. DiSilva indicates that the license was not renewed for the 1992-93 license term because of various incapacities of himself and his partners. Mr. Di Silva stated that he presumed that their former corporate attorney had taken case of the license renewal.

In late July of 1992, the prior owners, Jose and Fernanda Cerqueira became aware that the license had not been renewed. In August of 1992, the Cerqueira's approached the local ABC Board and attempted to file a renewal application on behalf of R.J.P.L. They were told that since they were not the licensees of record, they could not file the renewal application. Shortly thereafter, they spoke to Newark City Councilman Henry Martinez who also informed them that they could not file the renewal application. However, Mr. Martinez suggested that they contact an attorney since there was much at stake.

From this point until R.J.P.L. filed for bankruptcy in May of 1994, there is nothing in the record to indicate that either the principals of R.J.P.L. or the Cerqueira's did anything to renew the license.

The Honorable Novalyn L. Winfield, United States Bankruptcy Judge, entered an order with regard to the bankruptcy estate on December 6, 1993. Under the order, the Trustee Carmen J. Maggio, was to be permitted to sell the trustee's interest in the "expired liquor license" to Jose and Fernanda Cerqueira for \$5,000. The order was to be served on all interested parties within seven (7) days. It was actually served on the Division of Alcoholic Beverage Control in September of 1994, nearly nine (9) months later. the order approved the sale of the expired license with the understanding "that said liquor license will be renewed with the approval of the City of Newark's Alcoholic Beverage Commission and the State of New Jersey, Division of Alcoholic Beverage Control on the terms and conditions set forth in the letter annexed to the Trustee's application as Exhibit A". This letter was never submitted to ABC nor made part of the record below.

The renewal applications for 1992-93, 1993-94, 1994-95, and 1995-96 were never filed with the local ABC Board.

The first Verified Petition with regard to this license was filed on or about September 27, 1994, and related to the license years 1992-93, 1993-94 and 1994-95. The second Verified Petition, for 1995-96, was filed on or about September 22, 1995.

This matter was transmitted to the Office of Administrative Law to be heard as a contested case pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1. Pursuant to motion the Division of Alcoholic Beverage Control was granted summary judgment.

Written Exceptions to the Initial Decision were filed by the Petitioner, R.J.P.L., Inc. (R.J.P.L.), and by the Respondent, Division of Alcoholic Beverage Control (ABC), as permitted under N.J.A.C. 1:1-18.4(d). ABC also filed a reply to the Petitioner's Exceptions. The time for the Division to file its final conclusions and order was extended until February 16, 1997 by properly executed Order of Extension as provided by N.J.A.C. 1:1-18.8.

In her Initial Decision Judge Baer found that:

The undisputed facts of this case reveal that R.J.P.L. falls short of showing the circumstances beyond the licensee's control that are required by N.J.S.A. 33:1-12.18.

...As to the claim of substantial compliance based upon the information provided in the Verified Petitions...the evidence does not support a conclusion that liquor license 0714-33-489-004 may be activated.

For the reasons stated below, I accept the recommended decision of the Administrative Law Judge.

Liquor licenses are issued for an annual term beginning July 1st and ending on June 30th, N.J.S.A. 33:1-6. Licensees are required to file their renewal application no later than thirty (30) days after the commencement of the renewal term, N.J.S.A. 33:1-12.13. In other words an application may be considered by the local municipal issuing authority until July 30th of each year. Once the July 30th filing deadline has passed, in order for a local municipal issuing authority to consider a renewal for a liquor license, a Special Ruling must be issued by the Director of the Division of Alcoholic Beverage Control, N.J.S.A. 33:1-12.18. This

statute permits the licensee to petition the Director to allow a filing within an additional sixty (60) day period, which each years end on September 28th. In order for such a petition to be granted, the licensee must demonstrate circumstances beyond his control which prevented the filing of the renewal within the statutory time limitations. Once the September 28th deadline has passed, the Director of the Division of Alcoholic Beverage Control no longer has jurisdiction to renew the license. Neltex, Inc. v. New Jersey Division of Alcoholic Beverage Control, A-1481-97T7 (App. Div. Feb. 14, 1989) (unreported).

In determining whether an application is timely filed, the doctrine of substantial compliance may be applied pursuant to In Re Ronnie Trent Enterprises, ABC Bulletin 2296, Item 7 (1978).

Substantial compliance, when used in applications to excuse the failure of a party to comply with the terms of a statute, requires five elements: 1) a lack of prejudice to the opposing party; 2) a series of steps taken to comply with the statute involved; 3) general compliance with the purpose of the statute; 4) reasonable notice of the party's claim; and 5) a reasonable explanation of why there was not strict compliance with the statute. Bernstein v. Bd. of Trust, Teachers Pen. & Ann., 151 N.J. Super. 71, 77 (App. Div. 1977).

The Honorable Linda Baer found "the evidence does not support a conclusion that liquor license 0714-33-489-004 may be activated. There was no continuing effort by the licensee to renew the license." I concur with that conclusion.

Petitioner's exceptions contend that R.J.P.L. and the Cerqueira's have between them met the test for substantial compliance under Ronnie Trent.

Petitioners claim that Jose and Fernanda Cerqueira attempted to renew the license through the local issuing authority and were told that they had no legal standing to do so. A month later, they contacted Councilman Henry Martinez regarding renewal of their license and were told the same thing. They claim, "the Cerqueira's ...even went so far as to seek out Honorable Carmen J. Maggio, Trustee, U.S. Bankruptcy Court, the administrator of the R.J.P.L. bankruptcy case after they were advised by the Newark ABC that it would not be able to accept their application for renewal on behalf of R.J.P.L." However, this is the only evidence submitted with regard to the steps taken in an attempt to renew the license. These three (3) contacts do not rise to the level of substantial compliance.

There is no evidence in the record that renewal applications were filed for the 1992-93, 1993-94, 1994-95 or 1995-96 license terms on the part of the Cerqueira's, R.J.P.L., Inc., or by the Trustee in Bankruptcy and without such, it cannot be said that there was general compliance with the statute.

There has been no reasonable explanation with regard to why there was not strict compliance with the statute. In his affidavit, Mr. Di Silva indicated that he and his partners were incapacitated and therefore unable to file the license application for 1992-93. Mr. Di Silva was suffering medical problems resulting from a traffic accident and his partners were incapacitated due to their drug abuse.

Mr. Di Silva also indicates that he relied on a former and unnamed corporate attorney to comply with the renewal filing provisions. In In Re V-Bar, ABC Bulletin No. 2259, Item 5, (1977) Director Lerner found:

It is abundantly clear that Petitioner's difficulties emanated from and were generated by his lack of diligence in his business affairs and selection of an agent. Having selected another to manage his affairs, he cannot avoid the concomitant assumption of liability for his agents acts. (citations omitted) A liquor license is not a property right, rather a privilege. There is no vested right to a renewal by a licensee and the liquor business is one that must be carefully supervised and conducted in a reputable manner.

At no time can it be concluded that difficulties encountered by Petitioner were due to "circumstances beyond his control". His actions and lack of diligence proximately and naturally resulted in a situation for which Petitioner must accept responsibility.

For these reasons Director Lerner denied the petition to direct the issuance of a new license on failure to renew pursuant to N.J.S.A. 33:1-12.18. Similarly, the actions or the lack thereof of the principals in R.J.P.L., cannot excuse their failure to comply with the statutes because of reliance on their former corporate attorney.

The second exception raised by Mr. Guerino is that from April 29th, 1996, through the filing of the Initial Decision, Mr. Guerino himself and Jose and Fernanda Cerqueira had frequent and continual

contact with Judge Baer's office. He voices his displeasure as well as the displeasure and confusion of the Cerqueira's with the decision that was ultimately rendered, the lack of opportunity for oral argument and the length of time necessary to render the decision. N.J.A.C. 1:1-12.2(e) does not require that an Administrative Law Judge hear oral argument prior to rendering a decision on a Motion for Summary Judgment. Similarly, under N.J.A.C. 1:1-12.5 a Motion for Summary Decision shall be decided within forty-five (45) days from the date the record is closed. The record herein was closed on September 11, 1996 and therefore, the Initial Decision was filed only three (3) days following the expiration of the time limit. Additionally, Mr. Guerino fails to cite any remedy required or to indicate any harm suffered as a result of the time required by Judge Baer to review the papers and render a decision. I find this exception to be without merit.

In its exceptions, the Division takes issue with portions of the dicta of the Administrative Law Judge. First, the Division notes the ALJ's statement that had the bankruptcy petition been filed at a time when the license was still active, "the license would have enjoyed the protection of the U.S. Bankruptcy Law". Slip up OP, at 8. The Deputy Attorney General correctly pointed out that while this statement by the is accurate, it leaves open the possibility that it could be misconstrued to mean that if the bankruptcy had been filed while the license was still active, there would be no further obligation upon the debtor in possession or the Trustee in comply with Division regulations for filing applications and petitions. In fact, the opposite is true. In In Re Nejberger, 934 f.2nd 1399 (3rd cir. 1991) the Third Circuit Court held that bankruptcy code does not excuse a licensee or Trustee from its obligation to file timely renewal applications or appropriate petitions. In fact, assuming that the licensee had been able to establish actual or constructive compliance with his statutory obligations prior to filing the bankruptcy petition, there is still no evidence on record to indicate that the Trustee complied. There is no evidence that the Trustee extended the license to himself nor that he ever filed the renewal applications or petitions within the required time frame for the period that he has controlled the license.

The Division also took issue with Judge Baer's statement that "the bankruptcy Court cannot order the transfer of an interest which does not exist". They claim this fails to fully limit the authority of the bankruptcy Court in its directives regarding the Division of Alcoholic Beverage Control. In In Re Nejberger, the

licensee had filed an application to renew his liquor license which was denied due to non-payment of taxes. However, he was given a grace period within which the application would be reconsidered if the tax problem were corrected. During the grace period, the licensee filed for bankruptcy and thereafter docketed an adversary action in bankruptcy Court to compel the Board to renew the license. The Board refused saying that the grace period had expired. The Bankruptcy Judge directed the Liquor Board to grant the application for renewal.

The Circuit Court found the Bankruptcy Court's order that the Liquor Board grant the application for renewal to be overbroad. Rather, the Court found that the debtor must be offered the opportunity to submit a renewal application for review by the Board. However, "[t]he Board would then be free to exercise its discretion to grant or deny renewal...the Bankruptcy Judge's order inappropriately barred the liquor board from its statutory obligations to exercise discretion in reviewing a renewal application." In the case before me, the bankruptcy Judge issued an order approving the sale of the Trustee's interest in an expired liquor license to Jose and Fernanda Cerqueira with the understanding that the liquor license would be renewed in accord with the terms and conditions set forth in a letter annexed to the Trustee's application. The letter was never made a part of the record in the Office of Administrative Law and cannot be reviewed by the Division. Assuming arguendo that it would require the renewal application or petition for renewal to comply with the statutory scheme relating to same in New Jersey, the petition for renewal must be denied.

CONCLUSION AND ORDER

The principals in R.J.P.L., Inc., have failed to establish circumstances beyond their control in not filing the renewal application or the petition for 1992-93 and 1993-94. Jose and Fernanda Cerqueira have failed to establish constructive compliance with the statute under the test as set forth In the Matter of Ronnie Trent. The Trustee has failed to set forth any reasons for his failure to comply with the statutory requirements to have the license extended to himself and to file the yearly license renewal application or the petitions for Special Ruling pursuant to N.J.S.A. 33:1-12.18 and 33:1-12.39. I therefore conclude that the license expired July 30, 1992. In so concluding, I find that the petition filed regarding the 1992-93, license application is denied.

and that all subsequent applications including the most recent filed with regard to the 1996-97 application are moot.

Accordingly, it is on this 17th day of February, 1997,

ORDERED that the petition of R.J.P.L., Inc., requesting a Special Ruling to permit the issuance of a new license upon failure to timely renew for the 1992-93 license term pursuant to the provisions of N.J.S.A. 33:1-12.18 is hereby denied.

/s/ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

2. IN THE MATTER OF LUNDEN'S ENTERPRISES, INC., T/A THE SPORTSMAN BAR & GRILL - FINAL CONCLUSION AND ORDER GRANTING SUMMARY JUDGMENT AND DENYING PETITIONER'S APPLICATION FOR A NEW LICENSE PURSUANT TO N.J.S.A. 33:1-12.18.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

IN THE MATTER OF	)	FINAL CONCLUSION AND FINAL
	)	ORDER GRANTING SUMMARY
LUNDEN'S ENTERPRISES, INC.,	)	JUDGMENT AND DENYING
T/A THE SPORTSMAN BAR & GRILL	)	PETITIONER'S APPLICATION
	)	FOR A NEW LICENSE PURSUANT
HOLDER OF PLENARY RETAIL CONSUMPTION)	)	TO <u>N.J.S.A. 33:1-12.18</u>
LICENSE NUMBER 2123-33-004-003)	
ISSUED BY THE TOWNSHIP COMMITTEE	)	OAL DKT. NO. ABC 10939-96
OF THE TOWNSHIP OF WHITE	)	AGENCY DKT. NO. 06-96-213
)	

Katherine E. Wagner, Esq., Attorney for Petitioner

Analisa Sama Holmes, Deputy Attorney General, for Division of Alcoholic Beverage Control, (Peter Verniero, Attorney General of New Jersey, Esq.)

John H. Pursel, Esq., Attorney for Township of White

INITIAL DECISION

HONORABLE STEPHEN G. WEISS, ADMINISTRATIVE LAW JUDGE

Decided: July 17, 1997

Received: July 18, 1997

BY THE DIRECTOR:

No Exceptions to the Initial Decision of the Administrative Law Judge were submitted by either party as permitted pursuant to N.J.A.C. 1:1-18.4(d).

The petitioner has made application before the Director seeking relief pursuant to N.J.S.A. 33:1-12.18 for the 1995-96 license term. This matter was forwarded to the Office of Administrative Law as a contested case. Both the Division of Alcoholic Beverage Control and the Township of White filed Motions seeking summary disposition of the matter pursuant to N.J.A.C. 1:1-12.2(c). Neither the petitioner nor its attorney responded to the Motions.

After review of the papers, the Administrative Law Judge determined that the issue was ripe for summary judgment and granted the respondent's request thereby dismissing the appeal. The Administrative Law Judge in his decision found that the petitioner was merely the creditor of the licensee and not the licensee itself. Under such circumstances, the petitioner had no standing to make application since only the record holder of the license as of June 30th of that year can make application, see In Re: Ronnie Trent Enterprises, ABC Bulletin No. 2296, Item 2 (1978).

I have reviewed the Initial Decision of the Administrative Law Judge together with the Motions and Briefs in this matter and agree with his findings of fact and conclusions of law. The petitioner chose not to contest the motion for summary judgment. It has long been held on the issue of standing that only the licensee of record as of June 30th may petition the Director for relief under N.J.S.A. 33-12.18, In Re: Ronnie Trent, Ibid. Therefore, I will accept the recommended decision of the Administrative Law Judge and dismiss petitioner's appeal.

Accordingly, it is on this 26th day of August, 1997,

ORDERED that the application for summary judgment of the respondents, Division of Alcoholic Beverage Control and the Township of White is hereby granted; and it is further

ORDERED that the petition by Lunden's Enterprises, Inc., seeking authorization for a new license due to circumstances beyond its control regarding plenary retail consumption license number 2123-33-004-003 pursuant to the provisions of N.J.S.A. 33:1-12.18 is hereby denied.

/s/ JOHN G. HOLL
JOHN G. HOLL

3. HOT SHOTS, INC., V. MAYOR AND COUNCIL OF THE TOWNSHIP OF WATERFORD
- FINAL CONCLUSION AND ORDER ADOPTING INITIAL DECISION.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

APPEAL NO. 6408

HOT SHOTS, INC.,

APPELLANT,

V.

MAYOR AND COUNCIL OF THE
TOWNSHIP OF WATERFORD,

RESPONDENT.

FINAL CONCLUSION AND ORDER
ADOPTING INITIAL DECISION

OAL DKT. NO. ABC 6934-96

ROBERT T. COHEN, Esq., Attorney for Appellant

DAVID C. PATERSON, Esq., Attorney for Respondent (Maressa,
Goldstein, Birsner, Patterson, Drinkwater & Oddo, Attorneys).

INITIAL DECISION BELOW

HONORABLE JOSEPH F. MARTONE, ADMINISTRATIVE LAW JUDGE

DECIDED: March 13, 1997

RECEIVED: March 13, 1997

BY THE DIRECTOR:

Written exceptions to the Initial Decision were filed by appellant on April 24, 1997. The time to render a Final Decision was extended by Orders.

I adopt the factual findings and conclusions of law contained in the Administrative Law Judge's (ALJ) Initial Decision and incorporate them at length herein. As a result, appellants' appeal is dismissed.

The appellant, a liquor license applicant, has failed to establish that the issuing authority's denial of the person-to-person transfer application was erroneous and a clear abuse of discretion. Lyons Farms Tavern, Inc. v. Municipal Board of Alcoholic Beverage Control, 55 N.J. 292, 303 (1970); N.J.A.C. 13:-17.6.

Appellant was granted a three week extension to file exceptions in this matter or until April 14, 1997. The appellant then filed exceptions late on April 24, 1997. I strike them. If I were to consider the exceptions, they would be rejected.

Appellant argued that the ALJ erred in affirming the issuing authority's denial of the license based on the refusal of the sole shareholder of the appellant to answer the Township's questions concerning his other businesses activities. In appellant's exceptions, appellant advised that he owns an adult bookstore and a "gentlemen's club" in Pennsylvania. Appellant improperly raises new facts not heard before the ALJ. N.J.A.C. 1:1-18.4(c). Further, I wholeheartedly disagree with appellant's argument that if a license applicant has a clear criminal background check, then the issuing authority cannot ask the applicant about his prior business experience. No applicant for a license may refuse to submit full financial disclosure to an issuing authority. N.J.A.C. 13:2-1.9(c).

Whether or not an applicant is "qualified" to hold a liquor license does not limit an issuing authority's ability to examine a person's background. Rather such qualification sets forth an applicant's minimal standards. I note that an issuing authority has wide discretion to investigate an applicant for a liquor license. N.J.S.A. 33:1-19, 24. See Paul v. Brass Rail Liquors, 31 N.J. Super. 211 (App. Div. 1954).

New Jersey's alcoholic beverage industry is a highly regulated business with unique statutes, regulations and policies. The New Jersey Supreme Court has stated:

[I]t must be remembered that a license to sell intoxicating liquor is not a contract nor is it a property right. Rather it is a temporary permit or privilege to pursue an occupation which otherwise is illegal. In re Schneider, 12 N.J. Super. 449, 456 (App. Div. 1951). From the earliest history of our State, the sale of intoxicating liquors has been treated in an exceptional manner by the Legislature. Hudson Bergen County Retail Liquor Stores Association v. Board of Commissioners of the City of Hoboken, 135 N.J.L. 502, 506 (E & A 1947). "It is a subject by itself, to the treatment of which all the analogies of the law appropriate to other topics cannot be applied." Paul v. Gloucester County, 50 N.J.L. 585, 595 (E & A 1888). "The sale of intoxicating liquor is in a class by itself." Bumball v. Burnett, 115 N.J.L. 254, 255 (Sup. Ct. 1935). "As it is a business attended with danger to the community it may . . . be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils." Crowley v. Christensen, 137 U.S. 86, 91, 11 S. Ct. 13, 15, 34, L. Ed. 620, 624 (1890). Mazza v. Cavicchia, 15 N.J. 498, 505 (1954). The Legislature finds that these statutes are "intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed." N.J.S.A. 33:1-73.

In order to effectively regulate who may participate in the alcoholic beverage industry, the ABC and the municipal issuing authorities issue and annually renew liquor licenses which are a revocable privilege. N.J.S.A. 33:1-3.1(b)(1), (5); N.J.S.A. 33:1-3, Senate Law, Public Safety and Defense Committee Statement, No. 2399, L. 1985 c. 258 (1985); see, e.g., The Boss Co. v. Board of Comm'rs., 40 N.J. 379, 384 (1963); Sea Girt Restaurant v. Borough of Sea Girt, 625 F. Supp. 1482, 1486 (D.N.J. 1986), aff'd, 802 F.2d 448 (3d Cir. 1986).

The issuing authority must be satisfied that an applicant is not only qualified, but is capable of running such an establishment sensitive to the public's concern for its safety and welfare. See Zicherman v. Driscoll, 133 N.J.L. 586, 588 (1946). I disagree with appellant that the Township's inquiries about Mr. Ray Miles' prior business experiences were not relevant. Such questions are relevant. An issuing authority should have reasonable assurances that the liquor license and its premises will be operated properly. This is especially relevant in this matter since the appellant intended to continue the operation of a go-go which had been the site of 99 police calls since 1991.

In this matter, Mr. Miles did not answer questions about his prior experience based on his counsel's objections. Normally, I would remand this matter back to the issuing authority with instructions for the applicant to answer the issuing authority's questions concerning its prior experience and business background. But in the facts of this case, the sole shareholder of the applicant, Mr. Miles, has acquired all the shares of the transferor licensee. Thus, a remand is not appropriate. However, the township is free to raise its concerns at the time of annual renewal.

Accordingly, it is on the 23rd day of July 1997,

ORDERED that the Appeal of Appellant Hots Shots, Inc. is hereby **DISMISSED**; and it is further,

ORDERED that the action of the Mayor and Council of the Township of Waterford denying the person-to-person transfer of Plenary Retail consumption License No. 435-33-006-003 from VDB, Inc. to Hot Shots, Inc., be and is **AFFIRMED**.

/s/ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

Publication of Bulletin 2475 is hereby directed this
31th Day of October, 1997



JOHN G. HOLL, DIRECTOR
DIVISION OF ALCOHOLIC BEVERAGE CONTROL